UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ISAAC REID, CLEMENT GREEN, ROBERT B. WALKER, LIONEL SINGH, KEITH CLARKE, IBRAHIMA BAH, MAMADOU WAGUE, MARIE W. DASNEY, ORVILLE HARRIS, GREGORY MORGAN, TREVOR FRANCIS, EVERTON WELSH, FRANK TAYLOR, SEYMOUR LEWIS, AND JOHANN RAMIREZ on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

SUPERSHUTTLE INTERNATIONAL, INC., SUPERSHUTTLE FRANCHISE CORPORATION, VEOLIA TRANSPORTATION SERVICES, INC., d.b.a. SUPERSHUTTLE, SHUTTLE ASSOCIATES, LLC.,

Defendants.

CV-08-4854 (JG-VVP)

**ELECTRONICALLY FILED**

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO COMPEL
ARBITRATION AND TO DISMISS THE AMENDED COMPLAINT**

Dated: New York, New York
March 13, 2009

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## I. PRELIMINARY STATEMENT

Defendants SuperShuttle International Inc., SuperShuttle Franchise Corporation, Veolia Transportation Services, Inc. and Shuttle Associates, LLC ("SA") (collectively, the "Defendants") respectfully submit this memorandum of law in support of their motion to compel arbitration of five named Plaintiffs' claims and Fed. R. Civ. P. 12(b)(6) motion to dismiss the Amended Complaint.

The fifteen named Plaintiffs are current and former franchisees of SA, who provide(d) or transport(ed) customers, for a charge, to and from airports within the New York metropolitan region. Throughout Plaintiffs' entire relationship with SA, they knowingly and voluntarily were classified as independent contractors. Their independent contractor relationships were explicitly set forth in their SuperShuttle Unit Franchisee Agreements ("UFAs") that they signed. Despite their acknowledgment and treatment as independent contractors, Plaintiffs now claim they are "employees" entitled to various wages and benefits.

In the 11-count Amended Complaint, Plaintiffs, on behalf of themselves and purported similarly-situated franchisees, allege that:

- Defendants made wage deductions, payments by separate transactions and failed to pay minimum wages, overtime wages, and spread-of-hours wages in violation of New York Labor Law ("NYLL") § 193(1)-(2) and § 650 et seq., (Am. Compl., ¶¶ 89-100, 126-40, First, Second, Seventh, Eighth, Ninth Causes of Action);
- Defendants made misrepresentations and were unjustly enriched when Plaintiffs and class members were classified as independent contractors, (Am. Compl., ¶¶ 101-17, Third and Fourth Causes of Action);
- Declaratory judgment should be entered in Plaintiffs' favor declaring that Defendants' practices of classifying Plaintiffs and class members as independent contractors is unlawful, (Am. Compl., ¶¶ 118-20, Fifth Cause of Action);
- Defendants violated the Employee Retirement Income Security Act ("ERISA"), § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B), when they classified Plaintiffs and class members as ineligible under various ERISA plans, (Am. Compl., ¶¶ 121-25, Sixth Cause of Action); and

- Defendants failed to pay minimum and overtime wages to Plaintiffs and others in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., (Am. Compl., ¶¶ 141-53, Tenth and Eleventh Causes of Action).

As demonstrated below, the Court should compel arbitration of the five Plaintiffs who signed UFAs in or after 2005 ("Post-2005 UFAs"). Each of the Post-2005 UFAs contain arbitration provisions that require these Plaintiffs to arbitrate any and all claims arising out of the UFAs. Because Plaintiffs' claims are based on their allegations that Defendants misclassified them as independent contractors in their UFAs, their claims fit squarely within the scope of the arbitration agreement and courts have consistently held that such claims are arbitrable.

Moreover, all of the claims by the Plaintiffs who signed Post-2005 UFAs should be dismissed because they agreed not to bring class or collective actions when they signed their UFAs. The Post-2005 UFAs contain a class action waiver provision that expressly states that a franchisee can bring a claim on "an individual basis only and not on a class-wide, multiple plaintiff or similar basis." Therefore, these Plaintiffs' claims should be dismissed pursuant to their agreement not to bring such class or collective actions.

The Court should dismiss all Plaintiffs' ERISA claims because they failed to exhaust their administrative remedies and do not present any evidence that the futility exception to exhaustion should apply to their ERISA claims. Thus, Plaintiffs' ERISA claims should be dismissed because they should not be allowed to circumvent ERISA's exhaustion requirements.

The Court also should dismiss the NYLL, ERISA, misrepresentation, unjust enrichment and declaratory judgment claims of the Plaintiffs who signed UFAs on or before December 2, 2002 ("Pre-2002 Plaintiffs") on the ground that those claims are barred in whole or in part by the applicable six-year statute of limitations. Each of these Plaintiffs commenced their Causes of Action, in part, when they filed their original Complaint on December 2, 2008, and, in part, on February 12, 2009, when they filed their Amended Complaint asserting additional claims.

The NYLL, ERISA and New York common law claims each have six-year limitation periods that began accruing when these Plaintiffs entered into their UFAs. Because the six-year limitations period has expired on these Causes of Action, the Pre-2002 Plaintiffs' claims are, in whole or in part, time-barred and should be dismissed.

Plaintiffs Dasney, Harris, Singh, and Wague's ERISA, NYLL and common law misrepresentation, unjust enrichment and declaratory judgment claims also are untimely under the one-year statute of limitations period in their UFAs. The Post-2005 UFAs expressly limit claims to a one-year limitations period. Courts routinely uphold parties' agreement to shorten limitations periods; therefore, these Plaintiffs' ERISA, NYLL and common law claims should be dismissed, in whole or in part, as untimely.

For these reasons, the Court should grant Defendants' motion to compel arbitration and dismiss the Amended Complaint.

## II. BACKGROUND

The Plaintiffs are current or former franchisees of SA. (Am. Compl., ¶¶ 13-27.) As franchisees of SA, the Plaintiffs lease(d) or purchase(d) vans to transport customers, for a charge, to and from airports within the New York metropolitan region. (Id., ¶¶ 33, 40.)

Each Plaintiff voluntarily entered into a SuperShuttle Unit Franchisee Agreement ("UFA") setting forth the terms of the independent contractor relationship as a franchisee of SA, including remuneration, franchise fees, leasing or purchasing vans and general operating procedures. (Id., ¶¶ 34, 37, 40.) The UFA makes clear that no Plaintiff-franchisee has an employment relationship with SA:

> N. Relationship of the Parties
>
> (1) Nothing herein contained shall be deemed or construed to create the relationship of principal and agent, partnership, joint venture or employment, or a fiduciary relationship, and the

> Franchisee shall not hold itself as an agent, legal representative partner, subsidiary, joint venturer, servant or employee of [SA] or any affiliate of [SA]. With respect to all matters pertaining to the operation of business conducted hereunder, the Franchisee is, and shall be, an independent contractor. . . .

(Declaration of Edward Cerasia II, Esq. ("Cerasia Decl."), Ex. A, § 15(N)(1).)

The Plaintiffs can be categorized as follows: (1) those who signed UFAs prior to December 2, 2002 ("Pre-2002 Plaintiffs"); (2) those who signed UFAs on or after December 2, 2002, but before January 1, 2005; and (3) those who signed UFAs after January 1, 2005 ("Post-2005 Plaintiffs").[1]

The Post-2005 Plaintiffs agreed to arbitrate any and all claims arising out of their UFAs. Specifically, the arbitration provisions in the UFAs signed by the Post-2005 Plaintiffs state:

> . . . any controversy arising out of this Agreement shall be submitted to the American Arbitration Association at its offices in New York, New York for arbitration in accordance with its commercial rules and procedures which are in effect at the time the arbitration is filed.

(Cerasia Decl., Exs. E, F and G, §15(G). )[2] In addition, the Post-2005 Plaintiffs voluntarily and knowingly agreed to waive participation in any class action: "any arbitration, suit, action or other legal proceeding shall be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff or similar basis." (Id., Exs. E and F, § 15(G); Ex. G, § 15(I).)[3] Moreover, the Post-2005 Plaintiffs consented to a one-year statute of limitations for any arbitration, suit, action or other proceeding relating to their UFAs. (Id., Exs. E and F, § 15(I).)

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[1] The Pre-2002 Plaintiffs include: Keith Clark ("Clark"), Trevor Francis ("Francis"), Clement Green ("Green"), Orville Harris ("Harris"), Seymour Lewis ("Lewis"), Gregory Morgan ("Morgan"), Johann Ramirez ("Ramirez"), Isaac Reid ("Reid"), Frank Taylor ("Taylor"), and Robert Walker ("Walker"). (Cerasia Decl., Ex. B; Am. Compl., ¶¶ 13, 14, 15, 17, 22, 23, 25, 26, 27.) Everton Welsh ("Welsh") is the sole plaintiff who only signed a UFA on or after December 2, 2002, but before January 1, 2005. (Cerasia Decl., Ex. C; Am. Compl., ¶ 24.) The Post-2005 Plaintiffs are: Ibrahima Bah ("Bah"), Marie Dasney ("Dasney"), Harris, Lionel Singh ("Singh"), and Mamdou ("Wague"). (Cerasia Decl., Ex. D; Am. Compl., ¶¶ 18, 20, 19.) Harris became a franchisee in or about December 2001, however, he entered into his last UFA on September 28, 2005. (Cerasia Decl., Ex. D; Am. Compl., ¶ 21.) Therefore, he is considered both a Pre-2002 and a Post-2005 Plaintiff for the purpose of this motion. Singh became a franchisee in or about June 2004, but, he entered into his last UFA on May 16, 2007. (Cerasia Decl., Ex. D; Am. Compl., ¶ 16.) Therefore, he is considered a Post-2005 Plaintiff for the purpose of this motion.

[2] The relevant arbitration language in the UFA signed by Bah varies slightly from that cited above and states: ". . . any controversy arising out of this Agreement, including without limitation an allegation that this Agreement is void *ab initio*, shall be submitted to the American Arbitration Association at its offices in or nearest to New York, New York for final and binding arbitration . . ." (Cerasia Decl., Ex. G § 15(G).)

On December 2, 2002, Plaintiffs filed their original Complaint on behalf of themselves and similarly-situated current and former franchisees against the Defendants and two benefit plans, asserting the following claims:

- Defendants made wage deductions in violation of NYLL § 193(1), (Compl., ¶¶ 81-87, First Cause of Action);
- Defendants made payments by separate transaction in violation of NYLL § 193(2), (Compl., ¶¶ 88-92, Second Cause of Action);
- Defendants made misrepresentations when Plaintiffs and class members were classified as independent contractors, (Compl., ¶¶ 93-97, Third Cause of Action);
- Defendants were unjustly enriched when they classified Plaintiffs and class members as independent contractors, (Compl., ¶¶ 98-109, Fourth Cause of Action);
- Declaratory judgment should be entered in their favor declaring that Defendants' practices of classifying Plaintiffs and class members as independent contractors is unlawful, (Compl., ¶¶ 110-12, Fifth Cause of Action); and
- Defendants violated ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), when they classified Plaintiffs and class members as ineligible under the ERISA plans, (Compl., ¶¶ 113-17, Sixth Cause of Action).

Following the pre-motion conference held on February 5, 2009, Plaintiffs were granted permission to amend their Complaint and the Court set a briefing schedule for Defendants' motion to compel arbitration and motion to dismiss.

On February 12, 2009, Plaintiffs filed their Amended Complaint on behalf of themselves and similarly-situated current and former franchisees against the Defendants, adding the following five new claims for minimum wages, overtime and spread-of-hours:

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[3] The class action waiver language in the UFA signed by Bah varies from that cited above and states: "The parties recognize that their relationship is unique and that each franchisee is situated differently from all other franchisees, and that no one franchisee can adequately represent the interest of others. Therefore, the parties agree that any arbitration, suit, action or other legal proceeding shall be conducted and resolved on an individual basis only and not on a class-wide, multiple Plaintiff, consolidated or similar basis." (Cerasia Decl., Ex. G, § 15(I).)

- Defendants failed to pay minimum wages to Plaintiffs and class members in violation of NYLL Article 19, §§ 650 et seq., (Am. Compl., ¶¶ 126-32, Seventh Cause of Action);
- Defendants failed to pay overtime wages to Plaintiffs and class members in violation of NYLL Article 19, §§ 650 et seq., (Am. Compl., ¶¶ 133-37, Eighth Cause of Action);
- Defendants failed to pay spread-of-hours pay to Plaintiffs and class members in violation of NYLL Article 19, §§ 650 et seq., (Am. Compl., ¶¶ 138-40, Ninth Cause of Action);
- Defendants failed to pay minimum wages to Plaintiffs and collective members in violation of the FLSA, 29 U.S.C. § 201 et seq., (Am. Compl., ¶¶ 141-49, Tenth Cause of Action); and
- Defendants failed to pay overtime wages to Plaintiffs and collective members in violation of the FLSA, 29 U.S.C. § 201 et seq., (Am. Compl., ¶¶ 150-53, Eleventh Cause of Action).

## III. ARGUMENT

### A. THE APPLICABLE RULE 12(b)(6) STANDARD

Under Fed. R. Civ. P. 12 (b)(6), a court should dismiss a complaint for failure to state a cause of action unless it sets forth "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (criticizing the long-standing holding in Conley v. Gibson, 355 U.S. 41 (1957), and dismissing plaintiffs' claims because they failed to cross "the line from conceivable to plausible"). While a reviewing court is required to accept the plaintiffs' allegations as true, "[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996) (internal quotations & citations omitted); see also Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996) (noting that while the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) (holding that conclusory allegations as to the legal status of defendants' acts need not be accepted as true for purposes of ruling on a motion to dismiss). Legal conclusions masqueraded as "factual" assertions are insufficient to withstand dismissal under Rule 12(b)(6). See In re Aegon N.V. Sec. Litig., 2004 WL 1415973, at *5 (S.D.N.Y. June 23, 2004) ("legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness" on a motion to dismiss) (internal citations & quotation omitted).

In determining the sufficiency of Plaintiffs' claims under Rule 12(b)(6), the Court may consider documents incorporated in the Amended Complaint by reference or "documents either in [Plaintiffs'] possession or of which [they] had knowledge and relied on in bringing suit," such as the UFAs and ERISA plans. Brass v. American Films Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993).

## B. THE POST-2005 PLAINTIFFS SHOULD BE COMPELLED TO ARBITRATE ALL OF THEIR CLAIMS

Each Post-2005 Plaintiff entered into a valid and enforceable arbitration agreement that compels this Court to enforce their agreement to arbitrate before the American Arbitration Association ("AAA") and dismiss their claims entirely.[4]

A motion to compel arbitration is governed by Section 4 of the Federal Arbitration Act ("FAA"), which provides that "[a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The FAA, and the strong federal policy favoring arbitration that it embodies, requires courts to "rigorously enforce agreements to arbitrate." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); Hartford Accident & Indem. Co. v. Swiss

[4] Due to choice of law clauses in the UFAs, the pre-2005 UFAs are governed by the laws of Arizona and the post-2005 UFAs are governed by the laws of Delaware. (Cerasia Decl., Ex. H, § I & Ex. I, § M.) In New York, choice of law clauses are applied to questions of substantive law, but not to procedural matters. See Daisley v. FedEx Ground Package Sys, Inc., 2008 U.S. Dist. LEXIS 97373, at *6 (E.D.N.Y. Dec. 1, 2008). Defendants seek to dismiss the Amended Complaint on procedural grounds and, therefore, New York law applies.

Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001) ("[T]here is a strong federal policy favoring arbitration as an alternative means of dispute resolution . . . in accordance with that policy, where, as here, the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability").

When a litigant in a court proceeding refuses to arbitrate a dispute within the scope of a valid arbitration agreement, a judicial order compelling arbitration is mandatory. See 9 U.S.C. § 4; see also Dean Witter, 470 U.S. at 217 (holding that the FAA leaves no room for the exercise of discretion and mandates that district court direct the parties to proceed to arbitration on issues within the scope of an arbitration agreement); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) ("[Section] 4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a 'failure, neglect, or refusal' of any party to honor an agreement to arbitrate"). Courts should therefore "construe arbitration clauses as broadly as possible," Oldroyd v. Elmira Savings Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998), and "any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

The exacting application and broad construction of arbitration agreements dictate that, "[i]f the allegations underlying the claims 'touch matters' covered by the parties' [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them." Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987) (citing Mitsubishi Motors Corp., 473 U.S. at 624 n.13). Thus, a broad arbitration clause – such as that in the Post-2005 Plaintiffs' UFAs – "creates a presumption of arbitrability which can be overcome only if it may be said with positive assurance that the arbitration clause is not susceptible to the interpretation that it covers the asserted dispute." Oldroyd, 134 F.3d at 76; see also S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194 (2d Cir. 1984) (same); Wire Serv. Guild v. United Press Int'l, Inc., 623 F.2d 257, 260 (2d Cir. 1980) (same); Int'l Ass'n of Machinists & Aerospace Workers v. Gen. Elec. Co., 406 F.2d 1046, 1048 (2d Cir. 1969) (same).

The Second Circuit has instructed district courts to consider the following factors when deciding whether to compel arbitration: (1) whether the parties agreed to arbitrate; (2) the scope of that agreement; and (3) whether Congress intended the plaintiff's statutory claims to the nonarbitrable. Oldroyd, 134 F. 3 at 75-76; Ciago v. Ameriquest Mortgage Co., 295 F. Supp. 2d 324, 328 (S.D.N.Y. 2003); Calamia v. Riversoft, Inc., 2002 U.S. Dist. LEXIS 23855, at *6 (E.D.N.Y. Dec. 13, 2002). As demonstrated below, application of these factors clearly requires that the Post-2005 Plaintiffs be compelled to arbitrate all of their claims.

**1. The Post-2005 Plaintiffs Agreed To Arbitrate Their Claims**

The FAA provides, in relevant part, that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction *shall be valid, irrevocable and enforceable*." 9 U.S.C. § 2 (emphasis added); see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111-12 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 150 (2d Cir. 2004). It is beyond dispute that each Post-2005 Plaintiff entered into a valid, irrevocable and enforceable agreement to arbitrate all of his claims in the Amended Complaint, as evidenced by the following language in the UFAs:

> . . . any controversy arising out of this Agreement shall be submitted to the American Arbitration Association at its offices in New York, New York for arbitration in accordance with its commercial rules and procedures which are in effect at the time the arbitration is filed.

(Cerasia Decl., Exs. E, F and G, § 15(G).) Accordingly, the first Oldroyd factor – whether the parties agreed to arbitrate – is satisfied.

**2. The Post-2005 Plaintiffs' Claims Fall Within the Scope Of The Arbitration Agreements In Their UFAs**

The Post-2005 Plaintiffs' arbitration agreements are very broad. The UFAs provide for the arbitration of "any controversy arising out of the Agreement . . .," and govern all aspects of the Post-2005 Plaintiffs' relationship with SA, including their contentions that they are/were "employees." Indeed, because the Post-2005 Plaintiffs base all of their Causes of Action on the allegations that Defendants misclassified them as independent contractors in the UFA, those claims are grounded in the very document that mandates arbitration. (See Am. Compl., ¶¶ 78-88.) As such, there is no dispute that all of the Post-2005 Plaintiffs' claims fall within the broad scope of the UFA's arbitration provision. Thus, the second Oldroyd factor is satisfied.

**3. The Post-2005 Plaintiffs' Claims Are Arbitrable**

"It is well-settled that federal statutory claims can be the subject of arbitration, absent a contrary Congressional intent." Oldroyd, 134 F.3d at 77. Courts routinely require plaintiffs to arbitrate statutory wage/hour and ERISA claims.

For instance, in Ciago v. Ameriquest Mortgage Co., 295 F. Supp. 2d 324, 332 (S.D.N.Y. 2003), Judge Conner compelled a FLSA claim to arbitration, concluding that Congress had not evinced an intention to preclude arbitration of FLSA claims. The court agreed with the "Fourth Circuit that because of the similar remedial purpose and enforcement mechanisms shared by the Age Discrimination In Employment Act ("ADEA") and FLSA, the reasoning in Gilmer [– which held that claims under the ADEA are subject to compulsory arbitration –] dictates that claims under the FLSA may also be subject to compulsory arbitration provisions." Id. (citing Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002)); see also Bird v. Shearson Lehman/Am.

Express, Inc., 926 F.2d 116, 122 (2d Cir. 1991) (holding that ERISA claims may be subject to compulsory arbitration); Chaitman v. Wolf Haldenstein Adler Freeman & Herz LLP, 2004 U.S. Dist. LEXIS 22183, at *11 (S.D.N.Y. Nov. 3, 2004) (compelling plaintiff to arbitrate his ERISA claims pursuant to the terms of the arbitration agreement); Roofers Local 195 v. Shue Roofing, Inc., 2004 U.S. Dist. LEXIS 1409, at *8 (N.D.N.Y. Feb. 3, 2004) (same); Steele v. L.F. Rothchild & Co., 701 F. Supp. 407, 408 (S.D.N.Y. 1998) (FLSA claims are not exempt from the arbitration requirements of the FAA).

Similarly, Plaintiffs' NYLL and common law claims are subject to compulsory arbitration. Ciago, 295 F. Supp. 2d at 334 (compelling plaintiff's NYLL claims to arbitration because "nothing in the NYLL indicated that the state legislature intended to preclude compulsory arbitration of claims under those provisions"); Metzler v. Harris Corp., 2001 U.S. Dist. LEXIS 1903, at *15 (S.D.N.Y. Feb. 23, 2001) (granting motion to compel the plaintiff's NYLL claims); Stewart v. Mitchell Madison Group, LLC, 1999 U.S. Dist. LEXIS 3711, at *25 (S.D.N.Y. Mar. 25, 1999) (compelling arbitration of fraud and unjust enrichment claims).

Because the Post-2005 Plaintiffs entered into valid and enforceable arbitration agreements encompassing their FLSA, ERISA, NYLL and common law claims, and because there is no Congressional intent precluding such arbitration, this Court should compel the Post-2005 Plaintiffs to arbitrate all of their claims before the AAA.

### C. THE COURT SHOULD DISMISS THE POST-2005 PLAINTIFFS' CLAIMS BECAUSE THEIR UFAs PROHIBIT THEM FROM BRINGING CLASS OR COLLECTIVE ACTION CLAIMS

In addition to compelling the Post-2005 Plaintiffs to arbitrate their claims, the Court also should dismiss all of their claims because they expressly agreed not to bring or participate in any class or collective action against Defendants.

Courts have consistently held that contractual provisions precluding class action relief are enforceable. E.g., Bar-Ayal v. Time Warner Cable Inc., 2006 WL 2990032, at *16 (S.D.N.Y. Oct. 16, 2006) (enforcing arbitration provision that eliminated the possibility of bringing a class action); Tsaldilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (1st Dep't 2004) (enforcing arbitration provision which waived right to bring class action under a New York statute); Ranieri v. Bell Atlantic Mobile, 759 N.Y.S.2d 448, 449 (1st Dep't 2003) (same). This Court should reach the same conclusion.

As part of their UFAs, the Post-2005 Plaintiffs voluntarily and knowingly agreed that "any arbitration, suit, action or other legal proceeding shall be conducted and resolved on an individual basis only and not on a class-wide, multiple Plaintiff or similar basis." (Cerasia Decl., Exs. E and F, § 15(G) & Ex. G, § 15(I).) Accordingly, the Post-2005 Plaintiffs are contractually barred from pursuing any class or collective action claims, and all of their claims in the Amended Complaint should be dismissed on this ground alone.

## D. THE COURT SHOULD DISMISS THE PLAINTIFFS' ERISA CLAIMS BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

The Court should dismiss all Plaintiffs' ERISA claims because they failed to exhaust the administrative remedies set forth in the benefits plans at issue. (see, e.g., Cerasia Decl., Ex. J.)

Courts in the Second Circuit have repeatedly held that, before commencing a lawsuit, a plaintiff must exhaust the administrative remedies provided for in the ERISA plan. Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993) (recognizing the "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases"); Cannon v. Douglas Elliman, LLC, 2007 U.S. Dist. LEXIS 91139, at *19-20 (S.D.N.Y. Dec. 10, 2007) (dismissing plaintiffs' ERISA claim for failure to exhaust their administrative remedies);

Merkent v. SI Bank & Trust Spring 2004 Severance Benefit Plan, 2006 U.S. Dist. LEXIS 16508, at *6-7 (E.D.N.Y. April 5, 2006) (same); see also Schultz v. Stoner, 308 F. Supp. 2d 289, 304 (S.D.N.Y. 2004) (remanding case to plan administrator for determination of whether plaintiffs were within the scope of the plans' eligibility provisions). The purpose of the exhaustion requirement is to "reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims for benefits; and to minimize the costs of claims settlement for all those concerned." Egan v. Marsh & McLennan Co., 2008 U.S. Dist. LEXIS 6647, at *37 (S.D.N.Y. Jan. 29, 2008).

In this case, Plaintiffs did not exhaust their administrative remedies. Each of the ERISA plans that Plaintiffs reference in their Amended Complaint requires the submission of a claim and the adherence to a review or appeal procedure if that claim is denied. (Am. Compl., ¶ 32(a)-(h); see, e.g., Cerasia Decl., Ex. J.) In their Amended Complaint, Plaintiffs vaguely allege that they "attempted to exhaust their administrative remedies, but were prevented by Defendants from [doing so], or exhaustion would be "futile" where Defendant adjudged Plaintiffs . . . to be independent contractors rather than employees." (Am. Compl., ¶ 124.) Tellingly, Plaintiffs never allege that they submitted claims or to whom, much less followed the review process outlined in the plans. Instead, Plaintiffs make a perfunctory allegation that exhaustion would have been futile. (Id.) That is insufficient to avoid exhaustion.

ERISA provides an exception from the exhaustion requirement only if a plaintiff can make a "clear and positive showing that pursuing available administrative remedies would be futile." Davenport v. Harry N. Abrams, Inc., 249 F.3d 130, 134 (2d Cir. 2001) (quoting Kennedy, 989 F.2d at 594) (internal quotations omitted). For instance, Davenport, the plaintiff wrote her employer several letters asserting her right to participate in the employee benefit plan.

Id. at 132. In response, the company's Deputy General Counsel advised her that she was not entitled to benefits as an independent contractor. Id. The plaintiff never filed an application for benefits, nor did she request a copy of the Summary Plan Description ("SPD") or any of the plan documents; instead, she filed a lawsuit. Id. The court held that the "correspondence did not amount to an un-ambiguous application for benefits and a formal or informal administrative decision denying benefits [such that] it is clear that seeking further administrative review of the decision would be futile." Id. (quoting Barnett v. IBM Corp., 885 F. Supp. 581, 588 (S.D.N.Y. 1995) (internal quotations omitted). Thus, the court dismissed plaintiff's ERISA claim for failure to exhaust her administrative remedies. Id. at 136; see also Role v. Johns Hopkins Bayview Med. Ctr., 2007 U.S. Dist. LEXIS 96472, at *24 (E.D.N.Y. Oct. 10, 2007) (dismissing ERISA claim for failure to exhaust remedies because, rather than appeal denial of benefits through the plan, plaintiff filed suit); Cannon, 2007 U.S. Dist. LEXIS 91139, at *23 (rejecting plaintiffs' futility argument and dismissing the complaint where plaintiffs did not allege "that they made any formal demand for benefits but merely claim[ed] to have completed various benefits forms and returned them to . . . the human resources department"); Moore v. Fox Chevrolet, Oldsmobile, Cadillac, Inc., 2007 U.S. Dist. LEXIS 21252, at *16 (N.D.N.Y. Mar. 26, 2007) (holding that the plaintiff did not exhaust his administrative remedies when he failed to comply with the ERISA plan's appeal procedure).

Plaintiffs' attempt to invoke the futility exception fails because they did not even take the steps that numerous courts have found to be insufficient to satisfy the exhaustion requirements. Plaintiffs never filed an application for benefits, nor did they ever request a copy of the relevant SPDs prior to this litigation. Instead, they attempt to circumvent the exhaustion requirements outlined in the plans, (see, e.g., Cerasia Decl., Ex. J.), by vaguely alleging that any attempt to exhaust their administrative remedies would have been "futile." This allegation falls far short of the "clear and positive" showing required under ERISA, and not dismissing Plaintiffs' ERISA claims would allow them to thwart the purpose of ERISA's administrative exhaustion requirement. Consequently, Plaintiffs' ERISA claims should be dismissed for failure to exhaust their administrative remedies.

## E. THE PRE-2002 PLAINTIFFS' ERISA, NYLL, MISREPRESENTATION, UNJUST ENRICHMENT AND DECLARATORY JUDGMENT CLAIMS SHOULD BE DISMISSED AS TIME-BARRED

### 1. The Pre-2002 Plaintiffs' ERISA Claims That Pre-Date December 2, 2002 Are Time-Barred And Should Be Dismissed

Even if the Pre-2002 Plaintiffs' ERISA claims are not dismissed for failure to exhaust administrative remedies, those claims are barred, in whole or in part, by a six-year statute of limitations period.

Although ERISA does not proscribe a statute of limitations period for violations of ERISA § 502(a)(1)(B), the Second Circuit has held that a six-year statute of limitations applies to such claims. Miles v. N.Y. State Teamsters Conference Pension & Ret. Fund Employee Pension Ben. Plan, 698 F.2d 593, 598 (2d Cir. 1983) (holding that "the six-year limitations proscribed by New York's C.P.L.R. § 213 controls" ERISA actions); Brennan v. Metro. Life Ins. Co., 275 F. Supp. 2d 406, 409 (S.D.N.Y. 2003) (same). An ERISA claim accrues "upon a clear repudiation by the plan that is known, or should be known to the plaintiff regardless of whether the plaintiff has filed a formal application for benefits." Carey v. IBEW Local 363 Pension Plan, 201 F.3d 44, 48 (2d Cir. 1999).

Here, each of the Pre-2002 Plaintiffs' ERISA claims began to accrue on the date they signed their UFAs and became independent contractors – or certainly shortly thereafter – because, at that time, each of the Pre-2002 Plaintiffs knew or should have known that they would not be entitled to benefits. In fact, the UFAs expressly state that an employment relationship is not created by the UFA and "with respect to all matters pertaining to the operation of the business conducted . . . the Franchisee is, and shall be, an independent contractor." (Cerasia Decl., Ex. A, § 15(N).) Thus, the Pre-2002 Plaintiffs knew when they signed their UFAs that they would be paid as independent contractors and would not receive benefits. Consequently, their ERISA claims accrued at that time. See Downes v. J.P. Morgan Chase & Co., 2004 U.S. Dist. LEXIS 10510, at *10 (S.D.N.Y. June 3, 2004) (dismissing plaintiff's ERISA claims as untimely because the ERISA statute of limitations period began to run when plaintiff was classified as an independent contractor rather than an employee); Brennan, 275 F. Supp. 2d at 409 (dismissing ERISA claims as time-barred because the limitations period began to run when plaintiffs first learned that they were independent contractors and not getting benefits, which was either on their date of hire or the date they began working). Because Plaintiffs did not commence this action until December 2, 2008, the Pre-2002 Plaintiffs' ERISA claims are outside the limitations period and should be dismissed.

### 2. The Court Should Dismiss The Pre-2002 Plaintiffs' NYLL Claims As Time-Barred

The Pre-2002 Plaintiffs' NYLL claims are barred by the six-year statute of limitations. A cause of action brought under the NYLL must be commenced within six years. N.Y. Labor Law § 198(3); N.Y. Labor Law § 663(3). A plaintiff will only be able to recover wages that were not paid during the six years that immediately preceded the date on which the complaint was filed. See Godlewska v. Human Dev. Ass'n, 2006 U.S. Dist. LEXIS 30519, at *12 (E.D.N.Y. May 18, 2006) (holding that plaintiffs could allege timely claims under NYLL against defendants for any paychecks they received six years before they filed their complaint); Ramirez v. Rifkin, 568 F.

Supp. 2d 262, 273 (E.D.N.Y. 2008) (holding that plaintiff's NYLL claims prior to the six years that preceded the filing of her complaint were time-barred).

Plaintiffs commenced their First and Second Causes of Action alleging violations of NYLL on December 2, 2008, when they filed their original Complaint. Defendants were first given notice of Plaintiffs' Seventh, Eighth, and Ninth Causes of Action alleging new NYLL violations on February 12, 2009, when they filed their Amended Complaint and included those Causes of Action. Therefore, the Pre-2002 Plaintiffs' First and Second Causes of Action that are based on alleged conduct prior to December 2, 2002, and their Seventh, Eighth and Ninth Causes of Action prior to February 12, 2003, should be dismissed as time-barred.

### 3. The Pre-2002 Plaintiffs' Misrepresentation Claims Should Be Dismissed Because They Are Time-Barred By The Six-Year Limitation Period

The Court should dismiss the Pre-2002 Plaintiffs' misrepresentation claims as untimely. In New York, a claim for misrepresentation must be commenced within six years from the commission of the fraud or within two years from the date that the fraud was discovered or could reasonably have been discovered, whichever period is greater. N.Y. C.P.L.R. § 213(8); Scherer v. Gaildon Med. Sys., Inc., 2004 U.S. Dist. LEXIS 25043, at *7-8 (S.D.N.Y. Dec. 9, 2004) (statute of limitations for fraud is "the date of commission of the fraud, or two years from the date the fraud was or could reasonably be discovered, whichever is longer"); Julian v. Carrol, 704 N.Y.S.2d 654, 655 (2d Dep't 2000) (same). The plaintiff has "the burden of establishing that the fraud could not have been discovered before the expiration of the two-year period prior to the commencement of the action." Guilbert v. Gardner, 480 F.3d 140, 147 (2d Cir. 2007) (affirming dismissal of the plaintiff's fraud claims because he failed to prove that he could not have discovered the fraud claims before the two-year limitations period expired); see also Mazella v. Markowitz, 756 N.Y.S.2d 470, 471 (2d Dep't 2003) (affirming dismissal of plaintiff's action because it was not commenced within six years of the fraud, and plaintiff failed to meet her burden of proof that the fraud could not have reasonably been discovered until two years before she commenced the action).

Here, the Pre-2002 Plaintiffs' misrepresentation claims are based on their allegations that Defendants misclassified them as independent contractors in their UFAs. (Am. Compl., ¶¶ 101-05.) All of the Pre-2002 Plaintiffs became franchisees prior to December 2, 2002 and signed UFAs before that date. Consequently, the Pre-2002 Plaintiffs were aware of the alleged misrepresentation at the time they each signed their UFAs, and they do not and cannot allege that the fraud was not discoverable at that time (or certainly shortly thereafter). Because any alleged act of misrepresentation began to accrue at the time they signed their UFAs, the Court should dismiss their Third Cause of Action for misrepresentation as untimely.

#### 4. The Court Should Dismiss The Pre-2002 Plaintiffs' Unjust Enrichment Claims As Time-Barred

The Pre-2002 Plaintiffs' unjust enrichment claims are also time-barred. A claim for unjust enrichment is subject to a six-year statute of limitations period in New York. See N.Y. C.P.L.R. § 213(1) (limitations period for "an action that is not proscribed by law" is six years); Golden Pacific Bancorp v. Fed. Deposit Ins. Corp., 273 F.3d 509, 519 (2d Cir. 2001) (applying six-year statute of limitations to plaintiff's unjust enrichment unjust enrichment claim). The limitations period begins to run when the cause of action accrues. See Golden Pacific Bancorp, 273 F.3d at 519. Courts have held that a cause of action accrues "'upon the occurrence of the wrongful act giving rise to a duty of restitution.'" Id. (quoting, Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp., 596 N.Y.S.2d 435, 437 (2d Dep't 1993)); see also Plitman v. Leibowitz, 990 F. Supp. 336, 337 (S.D.N.Y. 1998) (holding that the statute of limitations for unjust enrichment accrues on the date of the wrongful act giving rise to restitution).

In this case, the Pre-2002 Plaintiffs' unjust enrichment claims are based on their allegations that Defendants misclassified them as independent contractors in their UFAs. (Am. Compl., ¶¶ 106-17.) All of the Pre-2002 Plaintiffs became franchisees prior to December 2, 2002 and signed UFAs before that date. Accordingly, the Pre-2002 Plaintiffs were aware at the time they signed their UFAs that they were classified as independent contractors. Because any wrongful act giving rise to restitution began to accrue at the time they signed their UFAs, the Court should dismiss the Pre-2002 Plaintiffs' Fourth Cause of Action for unjust enrichment as untimely.

### 5. The Pre-2002 Plaintiffs' Declaratory Judgment Claims Should Be Dismissed Because They Are Time-Barred

The Pre-2002 Plaintiffs' declaratory judgment claims are also time-barred by the six-year limitation period. "In order to determine whether there is a limitations prescribed by law for a particular declaratory judgment action[,] it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought." Olma v. Dale, 761 N.Y.S.2d 572, 572 (4th Dep't 2003). When looking at the substance, courts have applied the same statute of limitations period as the cause of action that gave rise to the declaratory judgment claim. Toles v. Schillaci, 2007 U.S. Dist. LEXIS 15378, at *2 (W.D.N.Y. Mar. 1, 2007) (applying the same statute of limitations for plaintiff's FLSA claim to her declaratory judgment claim); Olma, 761 N.Y.S.2d at 572 (applying the same statute of limitations to the plaintiff's declaratory judgment action as her claim for violation of N.Y. Election Law § 16-102). Therefore, the statute of limitations for the Pre-2002 Plaintiffs' declaratory judgment claim is the same six-year limitation period applied to their ERISA, NYLL and common law misrepresentation and unjust enrichment claims.

## F. PLAINTIFFS DASNEY, HARRIS, SINGH AND WAGUE'S NYLL, ERISA AND COMMON LAW CLAIMS SHOULD BE DISMISSED AS TIME-BARRED

Plaintiffs Dasney, Harris, Singh and Wague's ERISA, NYLL, misrepresentation, unjust enrichment, and declaratory judgment claims are time-barred because they each signed a UFA in or after 2005 and such UFAs contained a one-year statute of limitations provision (the "Post-2005 UFA"). (Cerasia Decl., Exs. E and F, § 15(I).) Thus, if the Court does not compel these individuals to arbitrate their claims, it should nonetheless dismiss these claims as barred, in whole or in part, by the statute of limitations.

Federal and state courts in New York have held that "[p]arties to a contract, of course, may agree on a limitations period shorter than that prescribed by statute." Burke v. PriceWaterhouseCoopers LLP, 537 F. Supp. 2d 546, 548 (S.D.N.Y. 2009); see also Marcucci v. N.Y. Dist. Council of Carpenters Welfare Fund, 2001 U.S. Dist. LEXIS 17947, at *2 (S.D.N.Y. Nov. 1, 2001) ("if a written agreement between the parties stipulates a shorter limitations period, that shorter period governs"); Protter v. Nathan's Famous Sys., Inc., 667 N.Y.S.2d 301, 301 (2d Dep't 1998) (holding that voluntarily contracted terms to shorten the applicable statue of limitations is applicable to franchise agreements).

Here, all of the post-2005 UFAs contain the following one-year statute of limitations language for bringing an action:

> The parties hereby acknowledge and agree that any arbitration, suit, action or other proceeding relating to this Agreement must be brought within one (1) year after the occurrence of the act or omission that is the subject of the arbitration, suit, action or other legal proceeding.

(Cerasia Decl., Ex. E and F, § 15(I).) As demonstrated above, the ERISA, NYLL, misrepresentation and unjust enrichment claims began to accrue when each of these Plaintiffs signed their UFAs. See Brennan, 275 F. Supp. 2d at 409 (dismissing ERISA claims as time-barred because the limitations period began to run when the plaintiffs first learned that they were independent contractors); Godlewska, 2006 U.S. Dist. LEXIS 30519, at *12 (holding that, under NYLL Articles 6 and 19, the plaintiffs could only recover for any paychecks they received during the limitations period before they filed their complaint); Plitman, 990 F. Supp. at 337 (holding that the statute of limitations for unjust enrichment accrues on the date of the wrongful act giving rise to restitution); Mazella, 756 N.Y.S.2d at 471 (affirming dismissal of the plaintiff's action because it was not commenced within the limitations period).

Dasney, Harris, Singh and Wague commenced their First, Second, Third, Fourth, Fifth and Sixth Causes of Action alleging NYLL, misrepresentation, unjust enrichment, declaratory judgment and ERISA violations on December 2, 2008. Therefore, Dasney, Harris, Singh, and Wague's pre-December 2, 2007 NYLL and ERISA claims, along with *all* of their misrepresentation, unjust enrichment, and declaratory judgment claims, are barred by the one-year limitation period in their UFAs. Since Dasney, Harris, Singh, and Wague filed their Amended Complaint on February 12, 2009 alleging their Seventh, Eighth, and Ninth Causes of Action for violations of NYLL, their pre-February 12, 2008 claims under those Causes of Action are also time-barred by the one-year limitations period.[5]

## IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court:

1. Compel the arbitration all of the Post-2005 Plaintiffs' claims pursuant to the arbitration provision in their UFAs;

2. Dismiss all of the Post-2005 Plaintiffs' claims because they agreed not to bring or participate in any class or collective action;

[5] Because Dasney, Harris, Singh, and Wague's declaratory judgment Cause of Action is based on their NYLL, ERISA, and common law claims, it too is time-barred by the one-year statute of limitations. See Toles, 2007 U.S. Dist. LEXIS 15378, at *2.

3. Dismiss Plaintiffs' Sixth Cause of Action under ERISA because they failed to exhaust administrative remedies;

4. Dismiss the Pre-2002 Plaintiffs' First, Second, and Sixth NYLL and ERISA Causes of Action that pre-date December 2, 2002, and dismiss their Seventh, Eighth, and Ninth NYLL Causes of Action that pre-date February 12, 2003, as barred by the six-year statute of limitations;

5. Dismiss the Pre-2002 Plaintiffs' Third, Fourth, and Fifth Causes of Action for misrepresentation, unjust enrichment, and declaratory judgment as barred by the six-year statute of limitations;

6. Dismiss Plaintiffs Dasney, Harris, Singh, and Wague's First, Second, and Sixth NYLL and ERISA Causes of Action that pre-date December 2, 2007, and dismiss their Seventh, Eighth, and Ninth NYLL Causes of Action that pre-date February 12, 2008, as time-barred by the one year limitations period in their UFAs;

7. Dismiss Plaintiffs Dasney, Harris, Singh, and Wague's common law misrepresentation, unjust enrichment and declaratory judgment claims as barred by the one-year limitations period in their UFAs.

Dated: New York, New York
March 13, 2009

Respectfully submitted,

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